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REPORT TO THE COMMITTEE ON RULES,
FINANCE AND INTERGOVERNMENTAL RELATIONS

SUPPLEMENTAL REPORT ON THE PROPOSED WORKER RETENTION ORDINANCE

Following the September 15, 1997, Rules Committee meeting, we were asked by certain committee members whether the Labor Council's proposed worker retention ordinance could: (1) place the new contractor in the position of "successor employer" requiring it to collectively bargain with the former contractor's retained workers, and (2) create a de facto employment relationship between the retained workers and the City. We have conducted additional research to explore these questions further.

1. The Successor Employer Doctrine

Nothing in our research changes the conclusions we reached in our September 11, 1997, Memorandum of Law on this question. The District of Columbia Circuit Court's decision in Washington Service Contractors Coalition, et al. v. District of Columbia, 54 F.3d 811 (D.C. Cir 1995) remains the only case interpreting an ordinance similar to the Labor Council's proposed ordinance. In that case, the court explained the "successor doctrine" as follows:

> The NLRB's "successorship doctrine" arises [out of the] operation of the [NLRA] and requires an employer to recognize and bargain with a union that had been named the bargaining representative of the employees under a predecessor employer if there remains a "substantial continuity in the employing industry." Whether such "substantial continuity" exists is determined by the Board on the "totality of the circumstances." Among the factors the Board considers is whether an employer elected to hire its predecessor's employees as a majority of its workforce.

54 F.3d at 816 (alterations in original)(citations omitted). The court then declined to rule on

whether this doctrine would be invoked by the application of the District of Columbia worker retention ordinance, finding that it was a matter for the NLRB to decide. Id. at 817. To date, we are not aware of any such decision by the NLRB.

If the Labor Council's proposed ordinance in the present case is enacted, a new contractor may argue that the successorship doctrine does not apply because it did not "elect" to hire its predecessor's work force, but was required to do so by the City. However, the affected union or the retained employees may respond that by electing to contract with the City, the new contractor accepted the conditions contained in the worker retention ordinance and thus impliedly made the election and assumed the obligations of a successor employer. Until the NLRB rules on this issue, it will be up to the courts to determine whether the "totality of the circumstances" in any given situation warrants applying the successorship doctrine.

Although in Washington Service Contractors the court was unwilling to rule on the issue, other relevant case law leads us to conclude that some courts, and ultimately the NLRB, will likely rule that the new employer is subject to the successorship doctrine. Contractors not wanting to spend the time and money to litigate the matter or deal with an uncertain outcome may decide either to: (1) accept the obligations of the successor employer, or (2) decline to contract with the City.

If the NLRB determines that the successorship doctrine is not applicable to the new employer complying with a worker retention ordinance, the hiring of new employees with a different collective bargaining agreement (or with no such agreement) probably would not directly interfere with the employer's collective bargaining agreement with its existing employees. However, contractors who retain workers may find themselves with two different sets of employee agreements, including differing terms of compensation and benefits, for (1) the retained employees and (2) their own existing employees. Contractors would have to decide whether it is tenable for them to accept this potential conflict before deciding whether to bid on a City contract.

2. The De Facto Employment Relationship with the City

Members of the Rules Committee also asked whether the City might be open to claims that the retained employees are actually City employees. We addressed this issue both in the September 11, 1997, Memorandum of Law, and in our earlier Memorandum of Law dated September 13, 1996. As we stated then, the right of control is an essential element of an agency or employment relationship. Both the new contractor and the retained employees may argue that by requiring the new contractor to hire the retained employees, and by setting certain terms and conditions for hiring and retaining these employees, the City has exercised sufficient "control"

over the retained employees to have assumed the role of employer.

In our more recent Memorandum of Law, we noted that the City's previous experience with a similar type of claim was unique, and that the City could protect against such a claim in the new contractor-retained employee situation by careful drafting and implementation of the ordinance. Among other things, we suggested that the ordinance expressly state that it does not intend to create an employment relationship between the City and the retained employees. However, if a court were to find enough City control to establish a de facto employment relationship with the City, the court could disregard the City's stated intent and require the City to provide worker's compensation, health and retirement benefits to the retained employees.

Because the concept is relatively new, neither legislation nor case law has developed to resolve the issues we have raised. At this point, it remains a policy question of whether the expected benefits of the Labor Council's proposed ordinance outweigh the potential adverse consequences we have identified in our Memoranda of Law. We will keep you apprised of any new legal precedents on this issue, and in the meantime would be happy to respond to any additional questions you may have.

Respectfully submitted,

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